No. 80-1874

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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STATEMENT

Respondents' brief rushes headlong past precedent, history, and basic rules of statutory construction to argue what it calls "most persuasive" policies.[1/] The principal question in this case, however, is not whether the Court should adopt respondents' notions of sound public policy, but what § 1983 requires.[2/]

1/ Respondents' Brief ("RB") 7.

2/ As in petitioner's opening brief, "exhaustion" will be used to refer to required exhaustion of state and local administrative remedies under § 1983. The "flexible exhaustion rule" benignly extolled in respondents' brief bears little relation to the exhaustion rule adopted by the court below, or applied subsequently in the Fifth Circuit. See, e.g., PB 26, 68-72. In a First Amendment case involving an Alabama state employee allegedly fired for complaining to state legislators, the Fifth Circuit recently held that an administrative procedure would be deemed adequate under Patsy so long as it meets constitutional requirements for a post-termination due process hearing. Bradford v. Bronner, No. 80-7591 (Jan. 11, 1982), slip op. at 14164. That is "flexibility" with a vengeance and far more restrictive than the exhaustion requirement observed in the Second Circuit, which retains

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Respondents' reliance on policy arguments cannot disguise their inability to justify dispensing with a rule applied or relied on in sixteen of this Court's cases over two decades; their failure to demonstrate that this Court's consistent construction of § 1983 was wrong as a matter of legislative intent; and their disregard of congressional approval of and reliance on the non-exhaustion rule.

Although most of the points raised in respondents' brief are adequately addressed in petitioner's opening brief, a few merit brief reply.

(footnote continued from preceding page) inter alia a criterion of speed. See Swan v. Stoneman, 635 F.2d 97 (2d Cir. 1980). Compelling federal courts to decide an additional constitutional issue and to scrutinize the adequacy of state procedures in every § 1983 case is hardly a means to reduce federal-state friction.

I. PRECEDENT AND HISTORY CONFIRM THAT SECTION 1983 DOES NOT REQUIRE EXHAUSTION

A. In her opening brief, petitioner showed that five cases applying the non-exhaustion rule, all either unanimous or 8-1, were the product of reasoned decision, tested against the careful dissents of Justice Harlan and a celebrated attack on the rule by Judge Friendly in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). Brief for the Petitioner ("PB") 17-18.[3/] Apart from complaining that even that showing does not establish what went on during this Court's deliberations on the issue (RB 35), respondents have not disputed that their position was squarely before the Court in McNeese and its progeny, particularly in Carter v. Stanton,

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3/ See also King v. Smith, 392 U.S. 309 (1968), inadvertently omitted from petitioner's opening brief.

405 U.S. 669 (1972). See PB 18 n.12.[4/]

Respondents nonetheless suggest that the non-exhaustion rule is not firmly established, arguing that this Court has never considered several of the reasons advanced by the court below for adopting a flexible rule, e.g., disparate treatment of state and federal defendants, federalism and comity, and Article III "ripeness" (RB 37). Justice Harlan's dissents in McNeese and Damico, however, and Judge Friendly's opinion in Eisen, squarely considered the federalism and comity arguments. Section 1983 cases pose no unique

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4/ During oral argument in Carter v. Stanton, appellants explained that the Court's prior decisions established "an absolute exemption from any exhaustion requirement," citing Damico v. California, 389 U.S. 416 (1967) and King v. Smith, 398 U.S. 309 (1968). O.T. 14. Appellees conceded that McNeese had held that "under § 1983 you did not have to exhaust administrative remedies", but urged, as respondents urge here, that that case be limited to its facts involving inadequate remedies. O.T. 32-33. See also O.T. 29, 47-48; Brief for Appellee Stanton 28-33.

ripeness problems. Federal courts have had no problem disposing of non-ripe § 1983 cases -- or other cases -- without relying on administrative screening, which deals with quite a different problem.[5/]

5/ E.g., Rizzo v. Goode, 423 U.S. 362, 372 (1976); O'Shea v. Littleton, 414 U.S. 488, 493-96 (1974). The distinction between ripeness and exhaustion, and the reasons why the two should not be confused, are ably discussed in United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1232-33 (3rd Cir. 1977). As in Lightcap, because plaintiff has alleged that a violation of constitutional rights has already taken place, the matter is plainly ripe. The contention that no constitutional violation has taken place until the actions of university officials are expressly ratified by the Board (RB 29-30, Brief for Washington et al. 18-21) was expressly rejected by this Court seventy years ago, Ex Parte Young, 209 U.S. 123 (1908), and has been repeatedly rejected since. E.g., Chardon v. Fernandez, 50 U.S.L.W. 3341 (1981)(limitations period for allegedly discriminatory decision runs from date decision made); Monroe v. Pape, 365 U.S. 167, 172-87 (1961).

The related argument that exhaustion is required here because the defendants are not the parties "responsible" for plaintiff's harm also lacks merit. See RB 27-30. Even assuming arguendo that plaintiff has sued the wrong defendants (a question not before this Court), the proper procedure is a motion to dismiss for failure to state a claim, not the imposition of an exhaustion requirement. Administrative proceedings are not likely to shed light on the issue of who, under

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The suggestion that disparate treatment of state and federal defendants in cases involving violations of constitutional rights raises constitutional problems is without support in any of this Court's decisions. See Brown v. GSA, 425 U.S. 820 (1976).

B. Unable to undermine the firm foundations of the non-exhaustion rule, and without any acknowledgement of the heavy burden they must meet in light of this Court's precedents, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-37 (1977), respondents urge that McNeese and its

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the facts of this case, Florida law, and § 1983 jurisprudence, is "responsible" for plaintiff's harm. For example, if petitioner had exhausted and named the university in the administrative proceedings, the university could apparently still not be sued consistent with Florida law under § 1983. JA 25-27. Similarly, an unsuccessful administrative proceeding against the Board would not render Board members responsible for primary conduct they had not "caused". See Monell v. Dept. of Social Services, 436 U.S. at 692-94.

progeny be overruled. RB 39-43. Only parts of their argument require response.

One of the four factors identified in Monell v. Department of Social Services, 436 U.S. 658 (1978), as bearing on the propriety of departure from stare decisis is whether overruling would "be inconsistent with recent expressions of congressional intent." 436 U.S. at 696. Addressing this factor, respondents provide only a string citation for the irrelevant proposition that the views of subsequent Congresses are of limited value in statutory construction. RB 40. Those cases are inapposite here, however, because they bear on how initially to interpret a statute, not, as this part of the Monell test inquires, whether subsequent Congresses have relied on an earlier judicial construction. Petitioner has examined recent expressions of congressional intent precisely as the

Court did in Monell, by looking at recent legislative activity. That examination, uncontradicted by respondents, shows what was not shown in Monell, namely congressional reliance on this Court's prior rulings. Compare Monell, 436 U.S. at 697-99 with PB 23-25, 42-46, 51-56 and Brief for NEA et al. 10-17.[6/]

With regard to the final Monell factor, whether the prior decision was wrong "beyond doubt", it is sufficient simply to observe that respondents provide no evidence whatsoever to contradict the extensive historical research marshalled in petitioner's brief and those of her

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6/ Particularly telling is respondents' failure to address in any way the impact of the 1979 amendment to § 1983. See PB 44-45. Under settled rules of construction, Congress' amendment of § 1983 in other respects, but failure to alter that well-known construction, means that "the legislative intent has been correctly discerned". United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979).

amici.[7/] In light of that historical showing, the non-exhaustion rule is plainly correct.

II. CONGRESSIONAL ACTION CLEARLY PRECLUDES AN EXHAUSTION REQUIREMENT

Petitioner has previously demonstrated that Congress, when it decided to require exhaustion only in a limited class of selected § 1983 cases, and then only under carefully controlled conditions, was fully aware of the non-exhaustion rule, objections to it from the states, and problems allegedly arising from an increase in § 1983 filings. Respondents' confused

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7/ Compare RB 19-24, 41 with PB 30-39; Brief for the NEA et al. 18-24; Brief for the NAACP Legal Defense Fund passim. Respondents' assertions that "Congress in 1871 could not have intended to require prior resort to state administrative agencies" (RB 21) and that petitioner's historical argument is anachronistic are plainly wrong. Clyde v. United States, 80 U.S (13 Wall) 38 (1871); The Collector v. Hubbard, 79 U.S. (12 Wall) 1 (1871). See generally Brief for NEA et al. 21-24; Brief for NAACP Legal Defense Fund 22-30.

arguments ignore, or simply fail to understand, what Congress has said and done.

A. To emphasize, as respondents do (RB 43-46), that there is a difference between jurisdictional exhaustion requirements imposed by Congress and judicially-imposed exhaustion is not to say, as they seem to, that courts retain untrammelled power to require exhaustion regardless of congressional intent. See, e.g., RB 57-58.

Similarly, that courts imposed administrative exhaustion in rate regulation cases without legislative guidance at the turn of the century hardly suggests that they should suddenly do so now in § 1983 cases, ignoring the fundamental importance Congress originally and subsequently ascribed to prompt access to a federal judicial forum under § 1983. Compare RB 43-46

with PB 30-46.[8/]

Apparently conceding that Congress does have a leading role to play, respondents make the peculiar argument (RB 48) that "Congress has never disapproved of the Court's potential adoption of a flexible exhaustion rule in § 1983 cases". That assertion refutes itself. Congress does not have a practice of disapproving decisions this Court has not yet reached. Congress does, of course, routinely disapprove of decisions already reached with

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8/ For no apparent reason, respondents treat employment discrimination cases as a special category of § 1983 cases, arguing that "particularly" in this area Congress has not precluded "a flexible exhaustion rule". RB 46-47. In fact, of course, to the extent that Congress has required exhaustion in Title VII, and made clear that those procedures do not apply to the post-Civil War remedies (PB 42-44), congressional action strongly militates against judicial imposition of an exhaustion requirement. See Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240-269 (1975); Northwest Airlines, Inc. v. Transport Workers, 67 L.Ed. 2d 750, 766-67 (1981).

which it disagrees. As we have shown, Congress has never disagreed with McNeese and its progeny despite knowledge and understanding of the non-exhaustion rule, and notable opportunity to reconsider it. See supra n.6.[9/]

The argument that § 1997e "never presented Congress with an opportunity to amend § 1983" (RB 53) is empty formalism. Notwithstanding its codification, § 1997e is in fact nothing but an amendment of § 1983, altering the procedural framework under which certain § 1983 claims may be brought. Indeed, as petitioner

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9/ Petitioner's reliance on statutes passed in 1964, 1972, 1979, and 1980, and the legislative history of those statutes, should be sharply distinguished from respondents' reliance on a series of bills that were never passed, or even seriously considered in committee. Compare PB 42-48 with RB 47-51. Congressional intent is properly sought by examining what Congress has enacted and said in the enacting process, not by examining bills that never received consideration. See e.g., United States v. Southwestern Cable Co. 392 U.S. 157, 170-171 (1968)(unsuccessful attempt to seek confirmation of a claimed power not probative of congressional intent); United States v. Wise, 370 U.S. 405, 411 (1962).

showed, the debate concerning § 1997e focused squarely on § 1983, canvassed many of the factors respondents now urge for imposing such a requirement, and rejected the need for such wide-ranging reform. PB 51-56.

B. Respondents' attenuated response to petitioner's argument concerning § 1997e itself (RB 51-60) simply ignores what Congress has actually done, and the impossibility of squaring a generally applicable § 1983 exhaustion rule with § 1997e.

1. The non-exhaustion rule was not only expressly relied on by § 1997e's sponsors;[10/] it was the principal just-

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10/ Respondents do not dispute our showing that Congress knew of the non-exhaustion rule (PB 51-52), and apparently concede its accuracy. See RB 52-53. Amici States have no rebuttal to our showing in this regard except to call
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ification for enacting § 1997e, and the indispensable predicate for its success. The elaborate certification procedures established by Congress in § 1997e only make sense upon the assumption that exhaustion is not now required under § 1983 and cannot be judicially imposed. Otherwise, states would have no incentive to accept the "carrot" held out to them and to adopt grievance procedures capable of certification under § 1997e, since all prisoner § 1983 cases could already be diverted to state administrative agencies under traditional exhaustion rules. Acceptance of respondents' position would

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(footnote continued from preceding page) Representative Butler's statements "simply in error" (Br. for Washington et al. 12 n.4), and to ignore the numerous statements to the same effect by § 1997e's sponsors and Assistant Attorney General Drew Days, cited in petitioner's brief (PB 23 n.17 and 52 n.47). See also Brief for NEA et al. 10-13.

render § 1997e a dead letter -- a wholly untenable result. See, e.g., Mercantile National Bank v. Langdeau, 371 U.S. 555, 560 (1963).[11/] The difficulty of reconciling a radical change in settled exhaustion law under § 1983 with § 1997e underscores both the importance of leaving to Congress any alterations of remedial procedures that Congress has designed or addressed, and also the significance of the

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11/ As petitioner has shown without contradiction, the legislative history demonstrates congressional knowledge and intention that many § 1983 claims of state prisoners -- all those arising in uncertified institutions, and all those unrelated to conditions of confinement -- could not be subjected to exhaustion of even plain, speedy, and effective remedies. See PB 54.

It would be equally violative of congressional intent, of course, to provide the necessary inducement by exempting prisoners in uncertified prisons, or those with claims unrelated to conditions of confinement, from a general exhaustion requirement suddenly applicable to all other § 1983 claims. See Brief for Washington et al. 12 n.4. Nothing in the legislative history supports that result.

failure of respondents (RB 51-60) and amici States (Brief for Washington et al. 12 n.4) to address or distinguish in any way the cases embodying that doctrine.[12/]

III. POLICY QUESTIONS CONCERNING EXHAUSTION ARE FOR CONGRESS TO RESOLVE

A. Respondents' brief fails to address petitioner's arguments that § 1983 cases differ from most other federal statutory cases because an exhaustion requirement could not be predicated on "the proper functioning of [a] particular administrative scheme Congress has constructed", McGee v. United States, 402 U.S. 479,

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12/ E.g., Alyeska Pipeline Service Co. v. Wilderness Society, 427 U.S. 240, 269 (1975), and Northwest Airlines, Inc. v. Transport Workers, 67 L.Ed. 2d 750, 766-67 (1981). See generally PB 48-49, 56-58. Respondents ironically argue that the exhaustion requirement adopted below would generally "have no practical functional distinctions" from the § 1997e practice, a contention which highlights the Fifth Circuit's usurpation of the legislative role.

483 n.6 (1972), and that the policy relied on by the Court below is either inappropriate for judicial consideration (i.e., crowded dockets) or subject to vigorous dispute by commentators and courts. See generally PB 59-65. Instead, respondents simply present, ably but irrelevantly, one side of precisely those much-disputed policy judgments. No justification whatsoever is advanced to support this Court's resolution of questions institutionally entrusted to Congress.

Respondents' attempt to analogize civil rights cases to other areas where exhaustion has been required also ignores § 1983's historical origins. As petitioner has shown without contradiction, the 42nd Congress enacted § 1983 out of a profound mistrust of "States and their institutions, tribunals and functions."[13/]

13/ Congressional Globe, 42nd Cong., 1st Sess. 365 (Rep. Arthur). See generally PB 31-35.

Congress expressly patterned § 1983 on the patterns of federalism relied on in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), under which federal courts enforced federal rights without intervention by state institutions. PB 34-35. In light of the history petitioner and her amici have set forth, an exhaustion rule created for rate regulation cases where Congress evidenced no hostility to or lack of faith in governmental agencies cannot be blindly transferred to civil rights claims against state and local officials. History and the statutory language it produced require adherence to the non-exhaustion rule until and unless Congress amends it. Diamond v. Chakrabarty, 447 U.S. 303 (1980). The Constitution's express grant of power to Congress to "enforce" the Fourteenth Amendment, U.S. Const.,

Art. XIV, § 5, pursuant to which § 1983 was enacted, underscores the appropriateness of congressional resolution of the policy questions raised by exhaustion.

B. Because the conflicting policies implicated in the exhaustion issue are so clearly matters for congressional choice in light of § 1983 and its subsequent history, we will not burden the Court with a full rebuttal to the policy arguments respondents copiously urge.[14/] The contention that embarking the judiciary on the Fifth Circuit's path would not soon exhaust it with the uncertain-

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14/ RB 12-34; see also Brief for Washington et al. 3-6, 18-20. For policy arguments supporting the non-exhaustion rule in § 1983 cases, see e.g., Preiser v. Rodriguez, 411 U.S. 475, 513-524 (Brennan, J., dissenting); Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum. L.Rev. 1201 (1968); and the dissenting opinions below (JA 62a-69a, 102a-120a).

ties, inefficiencies, and collateral issues that case-by-case development of an exhaustion requirement for § 1983 cases would necessarily entail, however, requires brief response.

Respondents concede that implementation of a general exhaustion requirement for § 1983 cases will inevitably require extensive judicial discretion because of the enormous variety of claims and agencies to which § 1983 applies. RB 62. Far from supporting respondents' position, however, that very variety suggests precisely why Congress has not generally required exhaustion for § 1983 claims, and why Congress has instead begun to address the exhaustion question one step at a time, after careful study. When a legislature addresses an issue incrementally, it is not for courts to alter and extend what Congress has done.

See PB 48-49, 56-58. Cf. Minnesota v. Clover Leaf Creamery Co., 66 L.Ed. 2d 659 (1981); Califano v. Jobst, 434 U.S. 47, 57 (1977); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

IV. THE AVAILABLE ADMINISTRATIVE REMEDIES ARE INADEQUATE ON THIS RECORD

If Florida's laudable "efforts to protect the civil rights of its employees" (RB 65) could produce fair results more quickly than § 1983 cases in federal court, attorneys would undoubtedly choose to pursue state procedures. As petitioner has shown, however, Florida's labyrinthine procedures epitomize the sorts of inadequate procedures federal courts have never required plaintiffs to exhaust.[15/]

15/ Logic suggests and counsel's experience confirms that literally thousands of individuals with potential § 1983 claims successfully pursue state or local administrative procedures. See also Brief for National Legal Aid and Defender
(footnote continued on following page)

A. Petitioner has previously set forth in abbreviated form the procedures available to her under Florida statutory law. PB 74-80. Although respondents' discussion of those procedures is somewhat obscure (RB 66-69), we understand them to concede its accuracy entirely except in two respects, involving the questions whether an employer is entitled to a trial de novo in a state court enforcement action, and whether a complainant may enter a judicial forum as of right 180 days after filing her complaint with the Human Relations Commission. Even if

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(footnote continued from preceding page) Association 7-8. Although these have proved difficult to document (such administrative decisions are typically not reported), it is difficult to believe -- unless self-interest plays no part in such decisions -- that individuals are submitting themselves to the costs of federal (or state) § 1983 lawsuits when comparable results may be had expeditiously and fairly in administrative agencies.

respondents were correct as to these two matters -- in fact, they are rather plainly wrong -- the scheme as sketched in petitioner's opening brief is inadequate as a matter of law for the reasons we previously outlined. PB 80-95.[16/]

16/ Citing Fla.Stat.Ann. § 120.68(4), respondents disingenuously contend that "an employer is not entitled to a trial de novo". RB 67 n.30; compare PB 80 & n.68. For a complainant who prevails in the Human Relations Commission, however, which respondents implicitly concede has no enforcement powers, the provision providing access to the courts is not § 120.68, but § 120.69, which authorizes (but does not require) "an agency seeking enforcement" or a "substantially interested person" to institute an enforcement action in state court. See PB 80. Under § 120.69(5), "the respondent may assert as a defense the invalidity of any relevant statutes, the inapplicability of the administrative determination to respondent, ... the inappropriateness of the remedy sought by the agency ... [or] the invalidity of the agency action."

Similarly erroneous, or at least misleading, is respondents suggestion (RB 68-69) that exhaustion will not take longer than six months because petitioner could "file her complaint in the first instance with the Human Relations Commission" and would be "clearly" entitled to resort to a state court 180 days later. As respondents are aware (see RB 68 n.31), Florida rules establish an initial grievance procedure in the university (footnote continued on following page)

B. Respondents have largely failed to respond to petitioner's demonstration that the available remedies are inadequate. See RB 67-70. Only three points require comment.

1. With regard to respondents' unsuccessful attempt to distinguish McNeese (RB

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of at least seventy-five days separate from and in addition to the Human Relations Commission. PB 75-77. For those who choose to seek relief initially at the university level, the administrative procedures terminate only after the additional Human Relations Commission procedures are pursued as well. Although a complainant theoretically "is free" to file initially with the Human Relations Commission (RB 68), Fla.Stat.Ann. § 23.167(11) authorizes the Human Relations Commission to remand a complaint (either at will or by rule) to the agency involved (i.e., the University). See PB 77 n.67. The pertinent statutory provisions do not indicate whether the university must operate within strict time limits in those circumstances, and do not indicate that a complainant whose grievance is so referred may enter a judicial forum after 180 days as if her complaint had never been referred. See § 23.167 (12).

67), nothing in their brief contradicts our showing that the Human Relations Commission has precisely the "tenuous" and ineffective power possessed by the Superintendent in McNeese: even if the Human Relations Commission agrees that constitutional rights have been violated, it may only petition a state court for relief. See PB 88.

2. Although respondents contend that the Florida procedures provide for relief "commensurate with [the relief] requested in petitioner's § 1983 claim" (RB 68), they never explain what relief is in fact available, and do not deny that Florida's procedures are wholly unable to award damages petitioner seeks. See PB 82 & n.70. That inadequacy alone renders the available procedures inadequate. Id.

3. Finally, citing a general provision of Florida administrative law, respondents appear to dispute our contention that no evidentiary hearing is available at the university level. Compare RB 66 n.28 with PB 75-76, 83. They are not convincing. The provisions of the Administrative code, cited in our opening brief, make no reference to hearings at that stage, and are so detailed as to suggest that the authorities relied on by respondents do not apply. Moreover, the hearing contemplated by the authorities relied on by respondents may well be satisfied by the later hearing specifically provided for in the analogous administrative code provisions governing the Human Relations Commission. See PB 79. In any event, the remedy is so uncertain and its structure in such doubt that, as in McNeese, it cannot be con-

sidered adequate. See generally PB 88-90.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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